

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-504V

July 31, 2007

Not for Publication

MARTA E. PAGAN,

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Petitioner,

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v.

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SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

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Respondent.

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Entitlement; statutes of
limitations have expired;
no equitable tolling

Francisco R. Gonzalez-Colon, San Juan, PR, for petitioner.

Rebecca Trinrud, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

¹ Because this unpublished decision) contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

Initially, petitioner filed a petition dated June 27, 2005 (No. 05-701V), under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that tetanus, pneumococcal, and influenza vaccinations administered to her on November 5, 1998 caused her bilateral carpal tunnel syndrome, optical neuritis, osteoporosis, L5-S1 disc protrusion, discogenic disease of the lumbar spine, thoracic myelopathy, lumbar radiculoneuropathy, and major depression.

The vaccination record lists only pneumococcal and influenza vaccinations administered on November 5, 1998. Therefore, there is some doubt whether petitioner received tetanus vaccine. But even if she had, the 36-month statute of limitations of § 16(a)(2) requires that petitioner file her petition within 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury.

In addition, it is extremely unlikely that petitioner received Prevnar, the childhood pneumococcal vaccination, on November 5, 1998.² But even if petitioner had received childhood pneumococcal vaccine, rather than adult pneumococcal vaccine, on November 5, 1998, her claim as to that vaccination would also be time-barred. Pneumococcal conjugate vaccines were added to the Vaccine Injury Table as of December 18, 1999. Petitioner would have had until December 18, 2001 to file a petition relating to damages from childhood pneumococcal vaccine, according to § 16(b)(2) of the Vaccine Act. (Adult pneumococcal vaccine is not on the Vaccine Table.)

The only vaccination that was not time-barred for petitioner at the time of her initial petition was influenza vaccine. Since influenza vaccine was not put on the Vaccine Table until

² Pneumococcal vaccine is listed on the Vaccine Injury Table for administration to children up to 23 months of age. 42 C.F.R. § 100.3; 66 Fed. Reg. 36735, *36737.

July 1, 2005, and petitioner filed her initial petition three days before that (June 27, 2005), the undersigned dismissed her petition without prejudice on July 15, 2005. National Vaccine Injury Compensation Program: Addition of Trivalent Influenza Vaccines to the Vaccine Injury Table, 70 Fed. Reg. 19092 (April 12, 2005) (to be codified at 42 C.F.R. pt. 100), putting influenza vaccine on the Vaccine Injury Table as of July 1, 2005.

On July 5, 2007, petitioner filed her second petition with the same allegations. The statute of limitations ran for pre-July 1, 2005 influenza vaccinations on July 2, 2007, the end of the two-year window for those who received influenza vaccinations up to eight years before the vaccine was added to the Vaccine Table. 42 U.S.C. §300aa-16(b) (“[petitioner] may file a petition for such compensation not later than 2 years after the effective date of the revision....”). Petitioner is therefore three days too late to file a petition alleging injury from influenza vaccine.

The undersigned has no subject matter jurisdiction over any of the three vaccines alleged to have caused petitioner injury in this case. The petition is dismissed with prejudice. Petitioner may not receive attorney’s fees and costs for this petition since the undersigned has no subject matter jurisdiction in this case. Martin v. Secretary of HHS, 62 F.3d 1403 (Fed. Cir. 1995).

DISCUSSION

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); Edgar v. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of

sovereign immunity was beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

Petitioner asked in her petition for equitable tolling to be applied in this case. However, the Federal Circuit has ruled that equitable tolling is not applicable in Vaccine Act cases. Brice v. Secretary of HHS, 240 F.3d 1367, 1368, 1374 (Fed. Cir.), cert. denied, 534 U.S. 1040 (2001). In Brice, the Federal Circuit stated, at 1373:

[T]he statute of limitations here begins to run upon the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not have known at the time that the vaccine had caused an injury.

In the prior decision dismissing this petition without prejudice, the undersigned advised petitioner that she may refile her petition up until July 1, 2007, under § 16(b)(2). Petitioner ignored this advice and filed her petition three days too late. The status conference set for Thursday, August 23, 2007, at 10:30 a.m., is hereby cancelled.

CONCLUSION

This case is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk of the court is directed to enter judgment in accordance herein.³

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.